88-2059

Supreme Court, U.S.
FILED
JUN 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

ROBERT R. KAUFMAN,

Petitioner,

against

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT KAUFMAN
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QUESTIONS PRESENTED

1. Whether it constitutes a deprivation of petitioners constitutional right to due process when the district Court refused to apply the New York Law Section B3-3.0 of the New York City Administrative Code and instead approved the substitution of an improper rule ll (h) which is arbitrary, capricious and illegal.

2. Did the Circuit Court Err when it refused to apply the Law as determined by the Unanimous Court of Appeals in the DOCTOR'S Council vs New York City Employees Retirement System (N.Y.L.J. June 8, 1988.

3. Did the Circuit court Err when it did not hold any evidentiary hearings on the motions for Summary Judgment and when it granted defendant's motion even though there were facts still in issue.

4. Did the Court of Appelas Err when it affirmed the District Court's Approval of Applying an IMPROPER STANDARD which the New York COURTS have held to be illegal and improper and a violation of DUE PROCESS. Sullivan v. Town of Salem 805 Fed. 2d 84,85.

PARTIES

Petitioner is Robert R. Kaufman an employee of the City of New York seeking a Declaratory Judgment that Rule ll(h) of the Respondent's rules is unconstitutional and violative of the Equal Protection clause of the fourteenth Amendment of the U.S. Constitution of the United States and it denies plaintiff due process as provided therein. The respondent is the New York City Employees Retirement System of which petitioner was a member since September 1967, when he was employed by the Welfare

Department. In September 1967 and since then petitioner became employed by the Board of Education of New York City and as a teacher of English has continued as such to the present.

TABLE OF CONTENTS

Page

Questions Presented i

Parties i

Jurisdiction 1

Constitutional Provisions and Statutes 1

Petition 2

Reasons for Granting the Writ 3

Statement 4

POINT I—Appellant Is A Person Entitled To Be A Member Of The New York City Pension Fund As Provided In The New York City Administrative Code Section B3-3.0.1 Ex 2 (Complaint) Appellant Has Been And Is Continuing In Employment With The City of New York and Earning In Excess of The Eight Hundred And Forty Dollars Per Annum Recited Therein. License # 375762 of the Board of Education 5

POINT II—The Court Below Erred When It Did Not Hold Any Hearings On This Matter And When It Relied On The Doctrine Of Practical Construction To Grant Summary Judgment To Defendant-Appellee And Dismissed The Plaintiff-Appellant's Complaint 6

POINT III—The Court Below Erred When It Refused To Apply The New York City Administrative Code Section B3-3.0 Since It Specifically Provides And Describes The Membership Of NYCERS 7

Conclusion 9

Appendix A—Order of the United States Court of Appeals for the Second Circuit 1a

Appendix B—Order Denying Petition for Rehearing En Banc 5a

Appendix C—Relevant Statutes 7a

Appendix D—Individual Rating Report of Per Session Service 8a

Appendix E—Certificate of Salary Differential 9a

Appendix F—Stipulation 10a

Appendix G—Application for Per Session Employment And Claim For Retention Rights 11a

Appendix H—Notice of Cross-Motion 16a

Appendix I—Affidavit of Robert R. Kaufman In Support.....18a

Appendix J—Affirmation of Harold J. McLaughlin In Support 25a

Appendix K—Affirmation of Harold J. McLaughlin In Opposition 28a

Appendix L—Opinion 34a

Appendix M—Decision *Doctors Council, et al., v. New York City Employees' Retirement System, et. al.*.....39a

Appendix N—Summons and Complaint 47a

CASES CITED

Matter of Barton v. Levine, 38 N.Y.2d 783 6

Bender v. Jamaica Hospital, 40 N.Y.2d 560, 561-562...8-9

Birnbaum v. Teachers Retirement System, 5 N.Y.2d 1 (1958).....7

Matter of Countrywide Brokerage v. Harnett, 58 A.D.2d 517.....8

Esteve v. Abad, 271 App. Div. 725 8

Herendeen v. Champion Intern Corp., 525 Fed 130.....7

Kurcsics v. Marchants Mut. Ins. Co., 49 N.Y.2d 451, 458 9

New York State Bankers Ass'n. v. Albright, 38 N.Y.2d 430 6

Parkof Edgewater v. Joy, 68 A.D.2d 107.....8

Patrolmen's Benevolent Ass'n v. City of New York, 41 N.Y.2d 205, 208.....9

Servomation Corp. v. State Tax Comm., 51 N.Y.2d 608, 612 9

Stillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 8

Sullivan v. Town of Salem, 805 Fed. 2nd 81 8

Matter of Verdecanna v. Carey (285 N.Y. 130, 135).....8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTION

The Order and Opinion of Judge Leonard D. Hand of the District Court was handed down July 26, 1989. The Judgment of the Court of Appeals was entered February 9, 1989. A copy of that Judgment is annexed as Appendix A, a copy of the Opinion of the District Court is annexed as appendix. The petition for rehearing was filed and denied by order of the second circuit on April 21, 1989. A copy of said order is annexed hereto, as appendix B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. allowed by Law. (Section 1254(1). This petition is filed within the time allowed by law.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Statutory provisions involved in this petition are the NEW YORK CITY ADMINISTRATIVE CODE Section B3-3.0, and Section B3-29.0 and Rule 11(h) of the Rules

and Regulations of the Board of Estimate of the City of New York, and the L4th Amendment to the United States Constitution, the Equal PROTECTION CLAUSE of the 14th Amendment to the U.S. Constitution, in Appendix- as contained in petitioner's complaint an exhibit before this Court.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert R. Kaufman respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, entered February 9, 1989 which affirmed the District Court's dismissal of the complaint on July 26, 1988. While this matter was still pending before the District Court an analagous action entitled Doctor's Council had just been decided by the New York State Court of Appeals, N.Y.L.J. June 8, 1988. That case also involved membership in the N.Y.C.E.R.S. and the Court explored the statutes and authority of N.Y.C. in making rules determining membership in the System. This matter was called to the attention of the District Court. It appears that the District Court which had previously ignored the New York Law by not applying The Administrative Law to plaintiff's position was once again, ignoring the Unanimous opinion of the Judges of the Court of Appeals by not applying their determination to the factual and legal background of this case and as such committed error. The law of the State of New York completly covers the employees of the City of New York and as such to fail to apply the covering statute was error. Since the Law as determined by the State Courts especially by the highest ruling body, as the Court of Appelas should be given effect to act as a bulwik against other bodies to keep them

from assuming the status of legislatures and to keep other judicial functions and legislative functions properly separated.

Reasons for Granting This Writ

1. Only the legislature is empowered to make or amend the laws of the State of New York, and we cannot confuse the reliability of our functioning by improper and illegal attempts of inroads we constitute attempts to construe and limit eligibility.

2. SURELY THE BOARD OF TRUSTEES LACK THE AUTGHORITY TO CREATE ELIGIBILITY or the power to DISENTITLE those employees whom the Legislature has ampowered. To counternance the latter as has been urged here by the City would in effect allow the agency to amend the heart of the statute. An administrative Agency cannot by regularity fiat directly or indirectly countermanda Statute enacted by the Legislature. (Servamation Corp. v. State Tax Comm. 51 N.Y.2d 698, 612.)

"KAUFMAN'S CONSTITUTIONAL RIGHT TO DUE PROCESS HAS BEEN VIOLATED"

3. Sullivan v. Town of Salem 805 Fed. 2nd at page 85 the Court explained its holding and explained that granting relief to plaintiff was ministerial (as it is in the Kaufman case at Bar since he was entitled to invoke the Administrative Code, an exhibit before this Court) the Court found a DUE PROCESS VIOLATION, because the denial was for an improper reason, since the City had no authority to set up eligibility rules or to disentitle those empowered by the Legislature. THE COURT OF APPEALS APPLIED AN UNCONSTITUTIONAL STAN-

DARD IN AFFIRMING THE COMPLAINT DISMISSAL and hence, erred.

Statement

This is a Civil Action brought by plaintiff seeking a Declaratory Judgment that Rule 11(h) of the rules of appellee is unconstitutional and violative of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution of the United States and it denies plaintiff due process as provided therein.

I respectfully refer this Court for the detailed facts to the verified complaint on file before this Court.

Appellant is presently a teacher of English in the Evening High School of The New York City Board of Education.

Appellant has been so employed as a teacher of English for over (20) twenty years since September 1967 (Ex. 1 annexed). Appellant's right to retention has been certified by the Board of Education itself. The contract of employment has been renewed from year to year, as well as the present year from 1988 and 1989 (Ex. 8__Complaint). Appellant became a member of the appellee retirement System in 1966 when he was employed by the Department of Social Services, as recited in the complaint. Appellant became licensed as a High School teacher in 1967 and went to work for the Board of Education in September 1967 as set forth therein, without any hiatus.

Appellant further seeks injunctive relief requiring the Appellee to immediately reinstate appellant's membership #391623 and enjoining appellee from exercising further jurisdiction over such membership except to process, implement and pay his pension which was filed for April, 1985 and approved by appellee to take effect June 1985 (Ex. 1__Complaint).

I annex hereto a copy of salary differential of appellant which shows that the Board of Education has given top rating to appellant who has had his Doctorate certified as Second Differential (Ex. #2).

I have annexed Ex. #3 hereto, a stipulation signed by the Board of Education and the United Federation of Teachers Union for Appellant where they established Appellant's seniority rights as of September 1967. I have annexed Ex. #4__acknowledging retention and renewal rights for appellant. *The Court below held no hearings.*

POINT 1

APPELLANT IS A PERSON ENTITLED TO BE A MEMBER OF THE NEW YORK CITY PENSION FUND AS PROVIDED IN THE NEW YORK CITY ADMINISTRATIVE CODE SECTION B3-3.0.1 EX 2(COMPLAINT) APPELLANT HS BEEN AND IS CONTINUING IN EMPLOYMENT WITH THE CITY OF NEW YORK AND EARNING IN EXCESS OF THE EIGHT HUNDRED AND FORTY DOLLARS PER ANNUM RECITED THEREIN. LICENSE #375762 OF THE BOARD OF EDUCATION.

Where a Statute is clear and unambiguous on its face, the legislation must be interpreted as it exists; the statute containing the membership requirements of NYCERS is plain on its face. (Membership shall consist of *all* personas in city service. City service shall mean service whether appointive or elective, as an officer or employee of the City *so far as such service is paid* for by the city." No special interpretative or policy deference should be accorded against the plain language of the statute.

The critical eligibility words are "*all persons in city service and* "employees" and they are *nowhere limited or*

qualified. In any event, that NYCERS had no practical construction which could have been relied upon in construing the Administrative Code provision. Moreover, the NYCERS Board of Trustees lacks the authority to create retirement eligibility; it likewise lacks the authority to create retirement eligibility; it lacks the power to disentitle employees whom the legislature has endowed. Thus the resolutions of the NYCERS Board of Trustees, which purport to exclude part time employees from NYCERS membership, cannot be legitimized by judicial ratification. *Doctors Council v. NYCERS* (71 N.Y. 2d 669).

The court below erred when it refused to apply the Administrative Code as written to confer eligibility for membership on appellant. *New York State Bankers Ass'n v. Albright,* 38 N.Y.2d 430; *Matter of Barton v. Levine,* 38 N.Y.2d 783, etc. *Doctors Council, supra.*

POINT II

THE COURT BELOW ERRED WHEN IT DID NOT HOLD ANY HEARINGS ON THIS MATTER AND WHEN IT RELIED ON THE DOCTRINE OF PRACTICAL CONSTRUCTION TO GRANT SUMMARY JUDGMENT TO DEFENDANT-APPELLEE AND DISMISSED THE PLAINTIFF-APPELLANT'S COMPLAINT.

Under Rule 56(c) of the Federal Rules of Civil Procedure summary judgment shall be rendered where there is no genuine issue as to any material fact "and the moving party is entitled to judgment as a matter of law." Applying this standard to the present case, the appellant is entitled to summary judgment. The appellee should be enjoined from implementing Rule 11(h) of the NYCERS rules insofar as it would deprive appellant of retirement benefits

and support pension payments, to which he would otherwise be entitled. Appellee should be directed to reinstate Appellant's membership so that he may have the opportunity to exercise his right to pension payments.

Under the long line of cases enuncited in *Winston v. NYCERS, etal.,* the Court of Appeals for the Second Circuit, August 1984, Nos. 132, 253, the Court stated: It was made clear that pensions represent deferred compensation aimed at long and faithful service.

In the case of *Birnbaum v. Teachers Retirement System,* 5 N.Y.2d 1 (1958) the New York Court of Appeals stated that the purpose of Article 5, Section 7 of the New York State Constitution was to fix the rights of the employee at the time he became a member of the retirement system and to prohibit any diminution of his rights prior to his actual retirement. The Court further held that his rights vested at the time he became a member of the system. Plaintiff relied on his certified retention rights, on his contract for his services and on his civil service status as a vested property right. Our courts have held that the previous suit must have been adjudicated between the identical parties. This was not so herein. The Judgment below was not rendered by a Judge of competent jurisdiction. *It therefore is void. Herendeen v. Champion Intern Corp.,* 525 Fed 130.

POINT III

THE COURT BELOW ERRED WHEN IT REFUSED TO APPLY THE NEW YORK CITY ADMINISTRATIVE CODE SECTION B3-3.0 SINCE IT SPECIFICALLY PROVIDES AND DESCRIBES THE MEMBERSHIP OF NYCERS.

Appellant has established he has met the requirements of the code and has fully complied therewith and he is

employed by New York City and earns the required amount per annum as certifed by appellee. The language of the statute is clear and unambiguous and since the City lacks the authority as well aa the NYCERS lacks the authority to have its Board of trustees disentitle employees whom the legislature has endowed Appellant has qualified for membership therein, Ex. 2 of Verified Complaint herein.

The Court found that the statute is clear and unambiguous and found the critical language for eligibility words are persons in City Service and all employees, and they are no where qualified and as such are permitted to be members of NYCERS.

The Court below erred when it granted judgment to defendant-appellee even though material facts were in favor of plaintiff-appellant and hence were in dispute. (*Stillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Esteve v. Abad,* 271 App. Div. 725). *Doctors Council, supra.*

Part-time employees are eligible for NYCERS membership by statute and case law (*Parkof Edgewater v. Joy,* 68 A.D.2d 107; *Matter of Countrywide Brokerage v. Harnett,* 58 A.D.2d 517. Re: *Doctors Council, supra.* In *Matter of Verdecanna v. Carey* (285 N.Y. 130, 135) the Court of Appeals of New York held that employment as a part-time street sweeper satisfied the criteria of "service in said department" entitling the employee's widow to pension fund benefits. The statutory eligibility criteria in Verdecanna was uncommonly simple as is the "in city service" *standard of this case.*

> "Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists. Absent ambiguity the court may not resort to rules of construction to broaden the scope and application of a statute. *Bender v. Jamaica Hospital,* 40 N.Y.2d

560, 561-562. It is fundamental that a court, interpreting a statute, should attempt to effectuate the intent of the legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used." (*Patrolmen's Benevolent Ass'n v. City of New York,* 41 N.Y.2d 205, 208.

The NYCERS Board of Trustees surely lack the authority to create retirement eligibility, it likewise lacks the power to disentitle employees whom the legislature has endowed. To countenance the latter, as has been urged here by the City, would allow the agency to, in effect, to amend the heart of the statute. "An administrative agency cannot by regulatory fiat directly or indirectly countermand a statute enacted by the legislature. (*Servomation Corp. v. State Tax Comm.,* 51 N.Y.2d 608, 612; *Kurcsics v. Marchants Mut, Ins. Co.,* 49 N.Y.2d 451, 458, *Doctors Council, supra.*

CONCLUSION

THUS, THE RESOLUTION OF THE NYCERS BOARD OF TRUSTEES CANNOT BE LEGITIMIZED BY JUDICIAL RATIFICATION (SEE MATTER OF INDUSTRIAL COMM. OF STATE OF N.Y. V. FIVE CORNERS TAVERN, 47 N.Y.2d 639, 646-647), DOCTORS COUNCIL V. NYCERS, supra.

The statutory eligibility for NYCERS membership as applicable to this plaintiff-appellant, part time teacher for the Board of Education of the City of New York, is plain and unqualified and must be given effect. That it has been said is the judicial function in this case. Re: *Doctors Council, supra.* Accordingly, the Order of the Court below

should be reversed, with interest, costs and disbursements to plaintiff. Summary judgment should be granted declaring in favor of plaintiff.

Yours respectfully,

ROBERT KAUFMAN
Petitioner Pro Se
1001 East 29 Street
Brooklyn, NY 11210
(718) 258-7235

APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the city of New York, on the 3rd day of February, one thousand nine hundred and eighty-nine.

Present:

HONORABLE
ELLSWORTH A. VAN GRAAFEILAND

HONORABLE RICHARD J. CARDAMONE

HONORABLE LAWRENCE W. PIERCE

CIRCUIT JUDGES

ROBERT R. KAUFMAN,

Plaintiff-Appellant,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Defendant-Appellee.

ORDER
Docket No.
88-7691

Robert Kaufman (Kaufman), *pro se,* appeals a judgment of the United States District Court for the Southern District of New York (Sand, J.) granting respondent's, New York City Employees' Retirement System (NYCERS), motion for summary judgment and dismissing his complaint, filed pursuant to 42 U.S.C. § 1983.

Appellant brought the instant action which originated in a pension dispute seeking a declaratory judgment regarding the constitutionality of Rule 11(h) of the Rules and Regulations of the Board of Estimate of the New York City Employees' Retirement System. Kaufman was employed by the New York Department of Social Services from September 7, 1966 until March 6, 1974 when he was dismissed dur to insubordination. This dismissal was upheld in an Article 78 proceeding. *Matter of Kaufman v. Dumpson,* 45 A.D.2d 993 (2d Dept. 1974), *app. dism'd.,* 35 N.Y.2d 993 (1975), *mot. for lv. to app. denied,* 36 N.Y.2d 643 (1975), *mot. for rearg. denied,* 37 N.Y.2d 741 (1975). During this period appellant was a member of NYCERS as a full time city employee. Subsequently, NYCERS informed him that his membership in NYCERS had been terminated as of the date of his dismissal from the Department of Social Services. Kaufman thereupon began state proceedings challenging the NYCERS determination contending that he was eligible for membership by virtue of his continuous employment as a teacher in the high school evening program since September 1967. The complicated and protracted state litigation need not be recited, except to note that the state courts determined Kaufman's membership in the state's pension system terminated upon his dismissal from the Department of Social Services and that Kaufman's employment with the Board

of Education did not constitute city service because he was paid on an hourly and per diem basis.

It is well established that a prior state court judgment will preclude subsequent federal litigation grounded on the same set of facts. 28 U.S.C. § 1738 (1982); *Migra v. Board of Education,* 465 U.S. 75 (1984). We have held that in applying *Migra* to determinations of the New York State courts, the "transactional" approach to *res judicata,* as applied in New York, must be applied by a federal court. *See Heimbach v. Chu,* 744 F.2d 11 (2d Cir. 1984). The transactional approach precludes any new action raising claims which could have been raised under the same set of facts involved in the earlier proceeding. *Reilly v. Reid,* 45 N.Y.2d 24, 27-31 (1978). Where the same set of facts serve as a foundtion, different legal theories do not establish separate causes of action. *Wright v. National Bank of Stamford,* 600 F. Supp. 1289, 1299 (N.D.N.Y.), *aff'd without opn,* 767 F.2d 909 (2d Cir. 1985) (circumstances paralleling the present litigation). We reaffirmed the preclusive effect of state court judgments when the petitioner files a suit in federal court alleging a *constitutional* claim arising from the same set of "transactional" facts which could have been raised at the state court level. *See Ruiz v. Commissioner of the Department of Transportation of the City of New York,* 858 F.2d 898, 902 (2d Cir. 1988).

Were we to reach the merits we would affirm substantially for the reasons stated by Judge Sand in his July 26, 1988 opinion.

The judgment appealed from is dismissed because the district court was precluded from entertaining this case.

Appeal dismissed.

Ellsworth A. Van Graafeiland, U.S.C.J.

Richard J. Cardamone, U.S.C.J.

Lawrence W. Pierce, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

PS-PRD
9/17/87

APPENDIX B—ORDER DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of April one thousand nine hundred and eighty-nine.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

ROBERT R. KAUFMAN,

Plaintiff-appellant,

v.

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Defendant-Appellee.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

DOCKET NO. 88-7691

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Plaintiff-Appellant, Robert Kaufman, pro se.

Upon consideration by the panel that heard the appeal, it is ORDERED that the said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX C—RELEVANT STATUTES

RELEVANT STATUTES

NEW YORK CITY ADMINISTRATIVE CODE

§B3-3.0 Membership; composition and eligibility, -Except as otherwise provided in section B3-48.0 fo the code, the membership of the retirement system shall consist of:

1. *All persons in city-service,* as defined in this title, in positions in the competitive or labor class of the civil service, who entered or reentered such service after the first day of October, nineteen hundred twenty, whose compensation is at a rate not less than eight hundred forty dollars per annum, nd who completed or shall complete six months of city-service after such entrance or re-entrance. (emphasis added)

§B3-29.0 Termination of membership; discontinuance of service.- Should a member discontinue city service except by death or retirement, he shall be paid such part of the amount of the accumulted deductions, if any, standing to the credit of his indivicual account in the annuity savings fund as he shall demand. . . . . .

APPENDIX D—INDIVIDUAL RATING REPORT OF PER SESSION SERVICE

THE CITY SCHOOL DISTRICT OF NEW YORK
INDIVIDUAL RATING REPORT
OF PER SESSION SERVICE

FILE NO. 375/62

NAME OF TEACHER Robert Kaufman LICENSE Eng
SCHOOL Erasmus Evening HS BOROUGH K
ACTIVITY TR
RATING FOR PERIOD FROM 9, 1985 TO 6, 1986 S
NO. OF SESSIONS SERVED 53
YEARS OF CONSECUTIVE SERVICE 19
(INCLUDING CURRENT TERM)
NO. OF DAYS ABSENT 13
NO. OF TIMES LATE
PRESENT SALARY RATE $21.15
PER hours

s/ Mark Kaufer
Supervisor

REGULATIONS

WITHIN THE LAST FIVE DAYS OF THE SESSION BUT PRIOR TO THE LAST SCHOOL DAY THEREOF THE RATING OFFICER SHALL COMPLETE THREE COPIES OF THIS RATING REPORT

ORIGINAL—TO BE GIVEN TO TEACHER
DUPLICATE—TO THE COORDINATOR'S OFFICE
TRIPLICATE—TO BE PLACED IN THE FILES OF THIS ACTIVITY IN THE SCHOOL

FORM OP 150

THE CITY SCHOOL DISTRICT OF NEW YORK
DIVISION OF PERSONNEL—BUREAU OF SALARY DIFFERENTIALS AND STATES
65 Court Street,
Brooklyn, New York 11201
CERTIFICATE OF SALARY DIFFERENTIAL

Member's Name and Home Address	Salary Differential	Effective Date of Action		
		Previously Granted	Not Cancelled	Not Cancelled
Robert Kaufman Eastern Pkwy. Brooklyn, N.Y. 11230	First Differential	7/1/68		
	Promotional Differential			5/1/75
	Intermediate Differential			
	Second Differential			5/1/75
English				

The above employee named is entitled to the salary differential or differentials indicated and, upon certification of service, is to be paid according to the appropriate salary schedule. Except when is indicated, differentials previously granted continue.

Issued: 6/23/75
Issued by: S. Schorr/fh
FOR THE CHANCELLOR

APPENDIX F—STIPULATION

[Letterhead of United Federation of Teachers]

A STIPULATION made September 14, 1976 between the Board and the Union on behalf of Robert Kaufman agree as follows—

1) Arbitration #1339-0645-76 is hereby withdrawn.

2) Robert Kaufman's seniority date as per session teacher in the evening high school is September, 1967.

3) Robert Kaufman waives any claims for back pay with respect to the grievance UFT #C3-300-178.

s/ Fred Magida
FOR THE UNION

s/ Bernard Finn
FOR THE BOARD

APPENDIX G—APPLICATION FOR PER SESSION EMPLOYMENT AND CLAIM FOR RETENTION RIGHTS

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DIVISION OF PERSONNEL

September 1, 1987-August 31, 1988 Per Session Year

APPLICATION FOR PER SESSION EMPLOYMENT AND CLAIM FOR RETENTION RIGHTS

1987-88 EVENING HIGH SCHOOLS

INSTRUCTIONS: This form is to be completed *prior to commencement of employment* by a person applying for work in a per session activity. It should be retained in the file: of the supervisor or program head. An applicant who wishes to claim retention rights must assert such a claim by use of this form. No person may be employed or paid for in a second per session activity or for more than 270 hours in one or a combination of per session activities without prior written approval of the Executive Director of Personnel, in accordance with Chancellor's Regulation C-175. (This form may be reproduced locally.)

1. NAME (Last, First, MI) Dr. Robert R. Kaufman
2. ADDRESS 1001 E 29th Street, B'klyn 11210
3. HOME TEL. NO. (718) 258-7235
4. FILE NO. 375762
5. SOC. SEC. NO. 110/09/0823
6. FULL TIME EMPLOYMENT
   School or Bureau____
   License or Title ____
   District ____
   Scheduled Hrs. of Daily Employment From:__To:__
7. PER SESSION EMPLOYMENT APPLIED FOR
   School or Bureau Evening High Schools
   District Division of High Schools-56

Title of Position Teacher-English
Scheduled Hrs. of Daily Employment
From: 5:50 P.M. To: 9:00 P.M.
Beginning date of assignment Sept 1987
Sessions in this activity Up to 75 Hrs. Per Session
3 hrs.10 Min Total Hrs. 240 plus

Do you claim retention rights in the position for which you are applying? Yes X No__

8. HAVE YOU WORKED OR DO YOU PLAN TO WORK IN ANY OTHER PER SESSION ACTIVITY DURING THIS PER SESSION SCHOOL YEAR (SEPTEMBER 1-AUGUST 31)? Yes__ No X

If yes, indicate below: (List additional positions on back of page) (Attachment)

Program Name____District____School or Bureau____
Title of Position_____
Actual or Proposed Period of Employment From:__To:__
Scheduled Hours of Employment From: __ To: __
Sessions in this activity__ Hrs. Per Session__ Total hrs.__
__Do you claim retention rights in this position? Yes X No__

**NOTE: UNDER COLLECTIVE BARGAINING AGREEMENTS, YOU MAY CLAIM RETENTION RIGHTS IN AT MOST ONE ACTIVITY.*

9. DECLARATION: I affirm that the information given above is, to my knowledge, accurate and complete and I understand that a willfully false answer to any question contained herein shall render this application null and void and may result in loss of retention rights, cancellation of employment, loss of pay and disciplinary action. I further declare that I am familiar with the requirements and limitations cited in Chancellor's Regulation C-175 and I agree to be bound by those provisions.

Signature of Employee_____Date February

APPROVAL BY SUPERVISOR: I certify that this applicant possesses the qualifications established for the position and that the selection was made after following advertising procedures set forth in Chancellor's Regulation C-175. (A copy of the advertisement is attached.)

Signature of Mr. Weissman_____Date_____
Form OP 175(5.S4)—OP 175 EHS 87-88, Pg. 2

FRANK L. SMITH, JR.
EXECUTIVE DIRECTOR HIGH SCHOOL DIVISION
EVENING HIGH APPLICATION FOR 1987-1988

1. Mr. Dr. Robert R. Kaufman
Home Address 1001 East 29th Street
Boro Brooklyn, Zip Code 11210
Home Phone No. (718) 258-7235
2. Indicate with an X the position sought
X Teacher of English
Secretary
Lab. Spec. __Bio__Ph&Ch__
Guidance Counselor
General Asst. _
Supv-In-Charge
Supervisor__Subj.__
Ed. Para__
School Aide
SUBJECT OF HIGH SCHOOL LICENSE
[Attach photocopy of your license] Previously Submitted
Subj. of Anciliary Certificate (if held)
File No. 375762
Soc. Sec. No.
3. Present Status: Regularly appointed to Senior H.S.
School_____
OTHER__ School Erasmus Hall Eve. H.S.
School Tel. No. ( ) since 1967
4. Number of years of service in Evening High Schools (19)
5. Number of years of service in school system as teacher 19 Other __[Specify]

6. *Per-Session Employment*

A. Were you employed in an evening high school for the per-session year September 1986-June 1987? Yes X No __

B. Are you employed in any other per-session activity of the Board of Education for the per-session year September 1986-August 1987? Yes __ No X

If yes, what activity?_____

Do you claim retention rights for this activity? Yes__No__

C. Do you plan to work in any other per-session activity during the 1987-88 year?

Yes__ No X. If yes, name activity_____

D. Do you intend to take a sabbatical in the 1987-88 school year? Yes __ No X.

7. Number in order of preference the borough in which you are seeking employment: __ BRONX

(1) BROOKLYN __MANHATTAN __ QUEENS __ STATEN ISLAND

NOTE: THE CURRENT DUAL JOB REGULATIONS CONTAINED IN CHANCELLORS REGULATIONS C-175 PERMITS MORE THAN ONE PER SESSION ACTIVITY ONLY IN SPECIAL CIRCUMSTANCES.

I hereby state that I understand any misrepresentation of material facts in this application, through mis-statement or omission, may cause invalidation of the application.

Signature s/ Date February

Assigned to:_____Date: _____

Application Noted by:
Signature: S. (Steve) Leighton
Principal/School Supervisor of Day
School in which you are employed
School: Erasmus Hall Eve
Date Feb.

MAIL APPLICATION TO: Mr. Kenneth Weissman, Principal, Evening High Schools, Room 223, 525 West

50th Street, NY, NY 10019. Complete application (both sides) must be received on/or before March 27, 1987. Assignments will be made before the summer for next fall. Please attach a separate sheet for any information you wish to add. *Please attach a photocopy of your license.*

Appendix H—Notice of Cross-Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT R. KAUFMAN,

Plaintiff,

NOTICE OF CROSS MOTION

-against-

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

88 CIV 1287
(LBS)

Defendant.

----------x

Sir:-

Please take notice that upon the annexed affidavit of Robert R. Kaufman sworn to May 18, 1988, with annexed papers, the verified complaint on file with this Court and the annexed affirmation of Harold J. McLaughlin attorney for plaintiff, the undersigned will move before the Honorable Leonard B. Sand at the United States Courthouse located at Foley Square on Thursday May 26, 1988 at 2:15 P.M. or as soon thereafter as counsel can be heard for an order pursuant to the Federal Rules of Civil Procedure granting Summary Judgment to the plaintiff As a Matter of Law and for such other and further relief as to this Court may seem just and proper in the premises.

Dated Brooklyn, New York, May 18, 1988.

Yours etc.,

HAROLD J. McLAUGHLIN
Attorney for Plaintiff
32 Court Street
Brooklyn, N.Y. 11201
(718) 624-8700

TO:- Peter L. Zimroth, Esq.
Corporation Counsel of the City of New York
100 Church Street, New York, N.Y. 10007
z)212) 566-2515

McLaughlin & McLaughlin, 32 Court St., Brooklyn, NY 11201

Appendix I—Affidavit of Robert R. Kaufman In Support

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT R. KAUFMAN,

Plaintiff,

-against-

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

Defendant.

----------x

88 CIV 1287 (LBS)

AFFIDAVIT

STATE OF NEW YORK) SS:-
COUNTY OF KINGS)

1. Robert R. Kaufman being duly sworn deposes and says Deponent submits this affidavit in support of his cross motion for Summary Judgment and in opposition to defendant's motion to dismiss the Complaint.

2. Deponent is a teacher of English in the Academic Evening High Schools of Brooklyn, for the Board of Education of the City of New York. Deponent has been so employed without interruption since September 1967.

3. Deponent became a member of the defendant Retirement System when he was employed by the Department of Welfare of the City of New York in October 1966. It is important to point out that the Evening High Schools are required to teach the same subjects as the day schools. theya re required to and do use the same texts and materials as the day schools. The students that are taught

in the evening High Schools are also academic Day School students. The Curriculum is the same. The Grammer is the same. The Vocabulary is the same. In other words, the class work and books are the same as the day school. The diplomas the students receive are the equivalent of the one the day school students receive. The lesson plans required of teachers are the same as those in the day schools. The credits the students receive are the same as the day school students. There is no difference in the requirements. The Academic Evening High School students are the same students who also attend the Day High School classes. Deponent knows this because he has taught them in the Day Time as well as in the Evening High School classes. The Board of Education requires us to use the same curriculum and the same day to day lesson plans in doing so.

4. While this plaintiff was on the payroll of the Department of Social Services, commencing in September of 1967 he was also employed by the Board of Education of New York City as a per session teacher in the Academic Evening High Schools, earning in excess of $840.00 per year as required by Administrative Code Section 83-3.0 to become a member of the New York City Retirement System, Number 391623.

5. His employment simultaneously by both subdivisions of the City Government was allowable by law and both jobs were of Civil Service status. He therefore was lawfully entitled to be a member of the New York City Retirement System under each and both of these jobs and was such member.

6. His service in the employ of the City has been and was never interrupted since 1966 until this date. In 1974 his simultaneous employment by the Social Service Department ceased but his employment since 1967 in the Education Department has never ceased nor even been interrupted.

8. The defendant in claiming its right to deprive this deponent of his membership in the pension system is solely derived from Rule 11(h) of its Retirement Board. This claim is untenable because the said Rule is contrary to the law, is unreasonable irrational and arbitrary. It cannot be sustained becaue it is in direct violation of the Fourteenth Amendment of the United States Constitution as set forth by the Complaint herein. It is a violation of due process of law.

9. This deponent's membership in the Pension System is of right, has never been interrupted as a matter of law, was continuous and never required an application for readmission as suggested by the defendant after his employment by the Social Services Department terminated.

10. Deponent's contract rights and retention rights have been renewed from year to year without interruption and since 1967 have definitely been established as vested rights.

11. In additional support of this cross-motion, the following exhibits are attached and made a part hereof:

Exhibit I shows deponent's seniority rights as an employee of the City of New York.

Exhibit II shows that deponent was employed at a salary rate of $9,700.00 per annum.

Exhibit III shows that deponent in 1986 had completed nineteen (19) years of uninterrupted and continuous employment by the City of New York.

Exhibits of the Complaint, number 1, 2 and 8.

12. Your deponent has faithfully and without interruption for over twenty (20) years served the City of New York as a teacher in its educational system and it is unconscionable to by illegal conduct deprive him in his old age of his lawfully acquired pension.

Wherefore it si respectfully requested that the motion to dismiss be denied in all respects and that since on the

undisputed facts, the determination of this cross-motion may be decided on the law alone, this cross-motion be granted as requested.

ROBERT R. KAUFMAN

Sworn to before me
this 18th day of May, 1988

(LETTERHEAD OF UNITED FEDERATION OF TEACHERS)

RECEIVED
OCT. 15, 1976
HERB MAGIDSON

A STIPULATION made September 14, 1976 between the Board and the Union on behalf of Robert Kaufman agree as follows -

1) Arbitration#

2) Robert Kaufman's seniority date as per session teacher in the evening high school is September, 1967.

3) Robert Kaufman waives any claims for back pay with respect to the grievance UFT

FOR THZ UNINV

FOR THE BOARD

THE CITY SCHOOL DISTRICT OF NEW YORK
INDIVIDUAL RATING REPORT

Name Kaufman, Robert R. Soc. Sec. #110-09-0823
File #375762 School Boys & Girls H.S.
Borough Brooklyn District #00
License Eng. __Tenured __ Probationer __ Substitute __
Non-Tenured Supervisor
Rating S For the Period From 2/14/78 to 6-30-78
S, U OF D)
Current Salary Rate $9,700 Per Annum
Absence Excluding Non-Attendance—T5 D5 H0 M0
Lateness—t3 H1 M12
Days in C.A.R.—1
or Borrowed Days** __
Days of Substitute Service __
*Regularly appointed staff may not exceed 200; regular substitutes, 120.
**May not exceed 20 for regularly appointed staff only.
Dated 6-20-78 Signature of Principal s/ (If Other, Show Title)

EXHIBIT II

THE CITY SCHOOL DISTRICT OF NEW YORK

INDIVIDUAL RATING REPORT
OF PER SESSION SERVICE

File No. 37576.2

Name of Teacher: Robert Kaufman License:English

School: Borough: K Activity: TR.

Rating for Period from: 9, 1985 TO 6, 1986 Rating: S

No. of Sessions served: 53Years of Consecutive Service: 19

No. of Days absent: 13 No. of times Late:

Present Salary Rate: 21.15 Per: Hours: Supervision:

REGULATIONS

Appendix J—Affirmation of Harold J. McLaughlin In Support

EXHIBIT III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT R. KAUFMAN,

Plaintiff,

88 CIV 1278
(LBS)

-against-

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

AFFIRMATION

----------x

HAROLD J. McLAUGHLIN, an attorney at law licensed to practice in all the Courts of the State of New York and in this Court does hereby affirm under penalty of perjury as follows:

1. I am the attorney for the plaintiff and am fully familiar with the facts herein.

2. I submit this affirmation in support of the plaintiff's cross-motion for summary judgment and in opposition to defendant's motion to dismiss.

3. It is respectfully submitted that the proceedings in the State Court were invalid and void since the determination and judgment were not made by a Justice of the Supreme Court but by a Hearing Officer, who exceeded his authority to make determination, and report. Therefore, the judgment was void for lack of competent jurisdiction.

4. Rule 11(h) of the Pension System Rules as applied to deprive this plaintiff of his pension is irrational, arbitrary, capricious and unreasonable and should not be upheld. Since said Rule 11(h) is not a legislative enactment it sould be struck down and declared in violation of the plaintiff's constitutional rights.

5. There is no genuine issue of material fact and it is respectfully submitted that the plaintiff is entitled to summary judgment as a matter of law.

6. It is respectfully submitted that the defendant should be enjoined from implementing Rule 11(h) of the Rules and Regulations of the Board of Estimate of the City of New York for the Administration and Transaction of Business of the New York City Employees Retirement System as illegal and in contervention of the law.

Wherefore it is respectfully asked that the plaintiff's cross-motion for summary judgment be granted as prayed for and the motion of the defendant be in all respects denied.

Dated: Brooklyn, New York May 18, 1988.

HAROLD J. McLAUGHLIN
Plaintiff's Attorney

STATE OF NEW YORK, COUNTY OF KINGS

I, Helen MacDonald, being sworn, say: I am not a party to the action, am over 18 years of age and reside at Brookly, New York.
On May 18, 1988 I served the within Notice of Cross-motion and Supporting Papers.
Service by Mail: Yes
By depositing a true copy thereof enclosed in a post-paid wrapper, in an official depositiory under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

PETER L. ZIMROTH, ESQ.
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007

Sworn to before me on May 18, 1988

Appendix K—Affirmation of Harold J. McLaughlin In Opposition

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT KAUFMAN,

Plaintixf,

AFFIRMATION IN OPPOSITION TO MOTION

-against-

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

Defendant.

----------x

HAROLD J. McLAUGHLIN, an attorney at law duly admitted to practice before all the Court of the State of New York and in this Court does hereby affirm under penalty of perjury:

1. I am the attorney for the plaintiff, and submit this affirmation in support of Plaintiff's complaint and in opposition to defendant's motion returnable on May 5, 1988 seeking to dismiss the complaint.

2. I am fully familiar with plaintiff's claims since I handled and appeared for him in all the Courts in which his matter was litigated.

3. The plaintiff was employed by the Department of Social Services of the City of New York in October of 1966. In our proceedings we made no claim for relief against said Department but only against The New York City Employees Retirement System. Therefore and for other reasons we set forth herein, the Judgment should be detemined to be void.

4. We mentioned the Social Services Department only to show that Plaintiff became a member of the Defendant Retirement System when he was so employed.

5. Even counsel for defendant in his wherefore clause of his affidavit of December 5, 1985 (page 89 of the Appendix affixed to the moving papers) asked the Court below to deem that plaintiff in his petition challenged the NYCERS determination concerning his membership therein solely. Defendant's counsel stated in such affidavit that plaintiff offered neither allegations nor evidence of any acts of the agency were improper.

6. As a result of a competitive Civil Service Examination, he was also granted a teaching license in September 1967. He was emloyed by the City of New York at Erasmus Hall Evening School, and has been so employed continuously and without hiatus to date. The holding of both these jobs at the same time was legally authoritzed. This Second Job was also legally Civil Service Status.

7. In 1966 as as result of his employment by the City of New York, he became a member of the Defendant Pension System and has remained so ever since. He at no time ever did or could withdraw from the Pension System in which he was Member No. 391623. In March, 1974, he was separated from his position in Social Services, but continued without interruption in his position as a Teacher of English in the Evening High School so that never was he required to reapply for admission in Pension System. As

such Teacher he was not permitted to be a member of the New York City Teachers Retirement System which is a separate entity apart from the defendant. under the New York City Administrative Code Sect. B 3-3.0 and B-3-29.0, he automatically was a member of the Defendant Retirement System. He has been a member of the Defendant Retirement System since 1967 and never resigned therefrom or was separated therefrom as a matter of law. The Appellate Division so found by its order dated November 22, 1983 and June 24, 1985 and February 14, 1984 as annexed to the Complaint.

8. In June of 1981 Plaintiff was mailed a copy of a letter dated June 1, 1981, which claimed he was not a member of the Defendant Retirement System. In December of 1981, Mr. Justice Pino of the State Supreme Court dismissed the original Order to Show Cause in the proceeding. On February 14, 1984 after appeal to the Appellate Division of the Supreme Court Second Judicial Department. The Court unanimously reversed the decision and Judgment of Mr. Justice Pino on the law. It held that the dismissal by the Social Services Department did not automatically terminate his membership in the Defendant Retirement System. They further remanded to Special Term only and exclusively for the timeliness of the petition and for no other reason. Its ruling that the Plaintiff was still a member of the defendant Retirement System was tested again on an application for reargument by the defendant, which was again denied, and is now the law of the case.

9. The defendant thereafter withdrew its claim and contest as to timeliness of service of the petition, which was the only question remaining for determination by the Court below.

10. Therefore, the Appellate Division having determined that Kaufman was never separated from City Ser-

vice, that Decision was Res Judicata and the law of the case.

11. The law applicable to this case is Administrative Code Sect. B3.3.0(Exhibit 2 annexed to the Complaint). The Defendant admits and concedes plaintiff earned and earns in excess of Eight Hundred Forty Dollars ($840.00) per annum in every single year from 1967 to 1985 inclusive without interruption.

12. Consequently the claimed determination by the Defendant that, as a matter of law the Plaintiff was terminated as a member of the retirement system was arbitrary, capricious and illegal and violated his constitutional rights under both Article 5, Section 7 of the New York State Constitution and also under the Due Process Clause of the United States Constitution.

13. Under the long line of cases enunciated in Winston v. New York City Teachers Retirement System, et, al, U.S. Court of Appeals for the Second Circuit, August 1984, Nos. 132.253, the Court stated it was made clear that pensions represent deferred compensation aimed at long and faithful service.

14. In both jobs which the Plaintiff held he was by law authorized to be a member of the N.Y.C. Employees Retirement System and thereby was such member. Just because he lost one job. No illegality, No immorality, No moral turpitude involved, he was never deprived of his rights under the other job.

15. Affiant makes refrence to the exhibits annexed to the complaint as referred to therein.

16. In the case of Birnbaum v Teachers retirment System, 5 N.Y. 2nd 1(1958) the New York Court of appeals stated that the purpose of Article 5 Section 7 of the New York Constitution was to fix the rights of the employee at the time he became a member of the retire-

ment system and to prohibit any diminution or impairment of his rights prior to his actual retirement. The Court further held his rights vested at the time he became a member of the system.

17. The plaintiff was declared still to be a member of the defendant Retirement System as aforesaid (Exhibit 4 of complaint) and as a result he served notice of retirement (Exhibit 1 of the complaint) on April 1, 1985 and it was approved by the Defendant for June 30, 1985 (Exhibit 1 of the complaint).

18. The Plaintiff had a valid contract to teach from year to year as renewed (Exhibit 8 of the complaint).

19. Our contention in this Court is that our vested rights in the New York City Retirment System have illegally been ignored and confiscated by Rule 11(h) of the Rules promulgated by the New York City Board of Estimate. That Rule 11(h) is the basis on which the defendant Retirement System has denied this plaintiff of his vested rights to his pension. It is a direct violation of the due process clause of the United States Constitution. That violtion has never been decided or discussed by any opinion or decision of the New York courts in this case.

20. The law as written by the New York State Legislature is Section B3-3.0 and B3-29.0 (Exhibit 2 of the Complaint) which sets forth the vested right of which this plaintiff has been deprived.

21. The law itself gives no authority to any adminstrative body to promulgate a rule which overrules and contradicts the law whether by fact or by interpretation.

Wherefore it is respectfully requested that the motion be in all respects denied.

Dated: April 25, 1988

HAROLD J. McLAUGHLIN

STATE OF NEW YORK, COUNTY OF: KINGS

I, Helen MacDonald being sworn, say: I am not a party to the action, am over 18 years of age and reside at: Brooklyn, New York.
On April 25, 1988, I served the within Affirmation in Opposition.
Service by mail: Yes
By depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exlusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

PETER L. ZIMROTH, ESQ.
Corporation Counsel of the City of New York
100 Church Street
New York, New York 10007

Sworn to before me on April 25, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ROBERT R. KAUFMAN,

Plaintiff,

88 CIV 1278 (LBS)

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

OPINION

Defendant.

----------x

APPEARANCES:

July 26, 1988

McLAUGHLIN & McLAUGHLIN, ESQ.
Attorneys for Plaintiff
32 Court Street
Brooklyn, New York 11201
HAROLD J. McLAUGHLIN, ESQ.,
-Of Counsel-

PETER L. ZIMROTH, Corporation Counsel
of the City of New York
Attorney for Defendant
100 Church Street
New York, New York 10007
JEAN L'ALLIER, Assistant Corporation Counsel
-Of Counsel-

HONORABLE LEONARD B. SAND, U.S.D.J.

SAND, J.

In this action brought under 42 U.S.C. § 1983, plaintiff seeks, *inter alia,* a declaratory judgment tht Rule 11(h) of the Rules and Regulations of the Board of Estimate of the New York City Employees' Retirement System ("NYCERS") is unconstitutional as violative of plaintiff's due process rights and rights pursuant to the equal protection clause. Defendant initially moved to idsmiss on the grounds of res judicata. At oral argument of this motion on May 5, 1988, the Court indicated its intention to treat the motion as one for summary judgment and accorded counsel an opportunity to make further submissions relevant to plaintiff's claim of a deprivation of federal constitutional rights. Plaintiff has cross-moved for summary judgment in his favor.

The underlying controversy relates to plaintiff's claim to entitlement to a pension. This question turns on the validity of plaintiff's claim that he is so entitled by virtue of his per diem or per session employment with the Board of Education in the evening schools.

Plaintiff became a caseworker for the New York City Department of Social Services on September 7, 1966. On March 6, 1974 he was dismissed and, after Article 78 challenge, this dismissal was upheld.

On September 24, 1981, plaintiff commenced an Article 78 proceeding to vacate defendant's determination that he was no longer a member of the retirement system. Plaintiff was unsuccessful in this litigation which he pursued through the intermediate appellate courts, the Court of Appeals denying leave to appeal on December 21, 1987.

On November 29, 1985 (shortly before a December 20, 1985 Kings County determination that he was not entitled to a pension), plaintiff brought another Article 78 proceeding challenging defendant's determination that he was not entitled to a pension. On or about November 18, 1986, the Supreme Court, Kings County, granted defendant's motion to dismiss the petition on the grounds that it was a collateral attack on the Decembr 20, 1985 proceedings. On February 11, 1987, plaintiff served, but has not perfected, an appeal from this determination.

Defendant urges that this too is an invalid collateral attack on a valid state court judgment and that a federal declaratory judgment action cannot be used as a substitute for the state court appellte process.

Although from time to time plaintiff's arguments drift into areas of pure state law questions, he attempts to counter the contention that his state law claims are precluded by asserting in his cross-motion for summary judgment his federal constitutional claim:

> The defendant in claiming its right to deprive thise deponent of his membership in the pension systgem is solely derived from Rule 11(h) of its Retirement Bord [sic]. This claim is untenable because the said Rule is contrary to the law, is unreasonable, irrational and arbitrary. It cannot be sustained because it is in direct violation of the Fourteenth Amendment of the United States Constitution as set forth by the Complaint herein. It is a violation of due process of law.

Affidavit, Robert R. Kaufman, May 18, 1988, par. 8.

We examine this claim on the merits.

Plaintiff asserts that in determining his pension entitlement, consideration must be given to his service as a

night school teacher following the termination of his full-time employment. This claim is clearly contrary to the explicit language of Rule 11(h) of the Rules and Regulations of the Board of Estimate for the Administration and Transaction of Business of NYCERS. Rule 11(h) provides:

> No person who, after October 1, 1920, renders service as a Teacher, Director, Instructor or Life Guard in the evening or summer schools or vacation playgrounds shall, by such service, acquire any right or benefit in the Retirement System.

Plaintiff's challenge to the constitutionality of this provision and the long standing interpretation which it has received from NYCERS is difficult to fathom. No grounds are articulated why the state cannot validly exclude from consideration for retirement pension purposes part-time collateral employment of the type excluded by Rule 11(h). Although plaintiff asserts the rule is "unreasonable, irrational and arbitrary," no support is furnished for this claim and the rule is certainly not defective on its face.

Moveover, the claim of a deprivation of due process rights is totally without support. Plaintiff has been afforded a full opportunity to challenge in administrative and state court procedures the validity of Rule 11(h) and its applicability to his case.

In short, we agree with defendant that plaintiff's federal constitutional arguments are totally without merit and are merely invoked to induce this Court to review collaterally issues of state law already resolved in protracted state court litigation.[1]

Defendant's motion for summary judgment is granted. Plaintiff's cross-motion is denid.

Complaint dismissed.
SO ORDERED.

Dated: New York, New York
July 26, 1988

U.S.D.J.

[1]The decision of the New York State Court of Appeals in *Doctors Council v. New York City Employees' Retirement System* (N.Y.L.J. June 8, 1988) in no way alters the conclusion that plaintiff has shown no deprivation of a federal constitutional right.

NEW YORK LAW JOURNAL

VOLUME 199__NO. 109
NEW YORK, WE'DNESDAY, JUNE 8, 1988

DECISIONS

Handed Down by the New York Court of Appeals

ADMINISTRATIVE CODE

Membership in Retirement System

Doctors Council, et al., Appellants v. New York City Employees' Retirement System, et al., Respondents

Decided May 31, 1988

Richard M. Betheil and Ronald H. Schechiman, NY. City,
for applellants
Peter L. Zimroth, N.Y.C.
Corporation Counsel
(Barry P. Schwartz and Fay Leoussis of Counsel)
for respondents

Bellacosa, J. We agree with the views expressed in the dissent at the Appellate Division that the pertinent statute is plain on its face, warranting summary judgment in favor of plaintiffs on the first cause of action entitling them as part-time employes to membership in the New York City Employees' Retirement System (NYCERS). Thus, the Appellate Division order insofar as appealed from should be reversed and the certified question answered in the negative.

Appellants are seven part-time doctors and their collective bargaining representative (jointly Doctors Council) which represents 1300 part-time and 600 full-time doctors employed by the City of New York (City) or the New York City Health and Hospitals Corporation (HHC). In December 1981, four of the seven doctors, already members of respondent NYCERS, sought a change in their retirement status and the other three sought retroactive membership.

Previously, in January 1981, respondent Herkommer, NYCERS' Executive Director, informed his Board of Trustees that part-time employees, primarily doctors and dentists in these instances, had been mistkenly afforded NYCERS membership. After reviewing the history and an in house evluation of this prior practice, together with a memorandum from the New York City Corporation Counsel concluding that the Board lacked power to provide NYCERS elligibility to part-time employees, the Board adopted a November 6, 1981 resolution declaring its impotency in this regard. It added that part-time employees should be denied membership in the future, but that part-time employees accepted into the system prior to the resolution would be permitted to continue as members. The appellant doctors' applications were not processed.

Doctors Council brought an action seeking declaratory and injunctive relief directing that part-time doctors are entitled to NYCERS' membership and that otherwise qualified part time doctors within the system are entitled to change their membership status. Defendants countersought a declaration that NYCERS' membership is limited to full-time emloyees.

Each side moved for summary judgment; the City's papers contended that NYCERS had a continuing and longstanding policy of excluding part-time employees from membership, although some had inadvertently been accepted. In support of this claim, NYCERS relied upon:

the Retirement System Handbook which provides that membership is available to "employees in full-time positions"; opinions by City Corporation Counsels from 1936, 1937 and 19743 stating part-time employees are inellgible; and three memoranda from 1970 and 1971 by an ex-Secretary of NYCERS (the then chief administrative position in NYCERS). NYCERS argued in the lower courts that these materials are bolstered by Rule 11(f), adopted in 1947, which purportedly formalized the exclusion of part-time employees consistent with the Corporation Counsel opinions of 1936 and 1937. Rule 11(f) provides in part-time that no person who is paid other than a regular per annum salary, [or] who renders less than full time service shall, by such service, acquire any right or benefit in the Retirement System." This argument was abondoned before our Court.

The plaintiff doctors asserted their rellance upon representations by the City of entitlement to membership in NYCERS and that it had been the "regular and consistent policy" of NYCERS prior to November 6, 1981 to grant membership to part-time doctors. The Executive Director of the Doctors Council added that as a part-time doctor he had been "required" to join the retirement system as a "condition of employment," that approximately 500 part-time doctors in the employ of the City and HHC were NYCERS members, and that hundreds of others had retired with NYCERS benefits. The ex-Secretary of NYCERS, who authored the 1970 and 1971 memoranda relied upon by the City, stated that prior to 1970 all part-time employees were entitled to NYCERS membership and that the memoranda reflected a change in position which was based solely upon the advice of the Corporation Counsel. Both those memoranda expressed that physicians and dentists had been exempted from the so-called general exclusion of part-time employees from membership. A former City Assistant Director of Labor Relations, who had negotiated contracts covering medical

personnel employed by the City and HHC, maintained that during his tenure doctors were entitled to and accorded NYCERS membership, that doctors were hired on the representation of the availiability of NYCERS membership, and that he was unaware of any doctor denied such benefits.

Insofar as pertinent, Special Term rejected plaintiffs' motion for summary judgment and declared that Administrative Code §§13-101(3) and 13-104 did not entitle the doctors to NYCERS membership. Noting that there was no legislative history for the section, the court relied largely upon the history of the City's asserted construction of the code provision and Rule 11(f).

The Appellate Division agreed in that respect, relying on the principles that "[a]bsence of facial ambigulty is *** rarely, if ever, conclusive" and that "[s]ound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope" *(New York State Bankers Assn. v. Albright,* 38 NY2d 430, 434, 436; *Uniformed Firefighters Assn. v. Beekman,* 52 NY2d 463, 471). St accepted Rule 11(f) the NYCERS staff, memoranda, the opinions of the Corporation Counsel, and the absence of legislative amendment of this historical construction as the basis for holding that these part-time City employees are not entitled to NYCERS membership.

Presiding Justice Murphy disagreed. He reasoned that these part-timers were eligible for membership pursuant to the unambiguous language of the Code which is controlling under clear precedent, and that the doctrine of practical construction was inapplicable because NYCERS never had a consistent policy of excluding part-timers and even if it had such a policy, it would be of no consequence where contrary to the plain language of the code. Leave to appeal on a certified question was granted by the Appellate Division.

The membership requirements of NYCERS have not changed since it was created in 1920 (see, Laws of 1920, ch 427). "[M]embership *** shall consist of *** all persons in city-service" (New York City Administrative Code §13-104 "(former B3-3.01]). "'City service' shall men service, whether appointive or elective, as an officer or employee of the city *** so far as such service is paid for by the city" and shall include "[s]ervice as a paid employee of *** the New York City Health and Hospitals Corporation" (Administrative Code §13-101[3](a). [b] [former B3-1.0(3)]).

In *Matter of Verdecanna v. Carey* (285 NY 130, 135), this Court held that employment as a part-time street sweeper satisfied the criteria of "service in said department" entitling the employee's widow to pension fund benefits. The statutory eligibility criteria in *Verdecanna (supra)* was uncommonly simple as is the "in City service" standard of this case.

"Where the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists. Absent ambigulty, the courts may not resort to rules of construction in broaden the scope and application of a statute" *(Bender v. Jamaica Hospital,* 40 NY2d 560, 561-562 [citations omitted]). "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" *(Patrolemen's Benevolent Assn. v. City of New York,* 41 NY2d, 205, 208 [citations omitted].

This is not to say, however, that the language of a statute must in all circumstances be literally or mechanically applied when, due to significantly changed circumstances, such application would cause an anachronistic *or absurd result* contrary to the centextual purpose of the enactment. Here, by contrast, the statutory protection of all persons in City-service, designed to exclude persons such as *independent contractors,* remains as important and relevnt in this case as when the statute was passed and continues to give effect to the statute's intended purpose and policy.

This reasoning, adopted by the lower courts, of*ew York State Bankers Assn. v. Albright* (38 NY2d 430, *supra)*)and *Uniformed Firefighters Assn. v. Beekman* (52 NY2d 463, *supra)* is inapplicable to the unqualified statutory definition in this case. Consideration of extrinsic factors is impermissible where the Legislature's direction is clear; where the statute is not ambiguous when read in context; where the plain meaning of the statute would not *lead to "absurd or futile results" or even unreasonable* results "plainly at variance with the policy of the legislation as a whole" *(New York State Bankers Assn. v. Albright,* 38 NY2d 430, 436-437, *supra* quoting *united States v. American Trucking Assns.* 310 US 534, 543-544). Nor is there in this case any "extensive legislative history [which] shows that the literal reading proposed***would frustrate the statute purposes" *(Uniformed Firefighters Assn. v. Beekman,* 52 NY2d 463, 471 *supra*).

Even if the practical construction by NYCERS, now urged by the City was itself consistent and definitive, which it is not in this case, no special interpretative or policy deference should be accorded against the plain language of the statute. The interpretation of this statute does not require special "knowledge and understanding of underlying operational practices or entail(s) an evaluation of factual data and interences to be drawn therefrom" *(Kursics v. Merchant Mutual Ins. Co.,* 49 NY2d 451, 459).

The critical eligibility words are "all persons in City-service" and "employees" and *they are nowhere limited or qualified.* Thus, in this case, we need go no further than the statute *(id.* at 459; *Servamation Corp. v. State Tax Comm,* 51 NY2d 608, 613). To employ practical construction analysis under these facts "does nothing more than to urge ambigulty where none exists" *(Sega v. State,* 60 NY2d 183, 190).

The record, establishes, in any event, that NYCERS had no practical construction which could have been relied upon in construing the Administrative Code provision. The City argued that NYCERS' Rule 11(f) was adopted to implement formally the Corporation Counsel's opinions of 1936 and 1937 that part-time employees were not entitled to membership. Insofar as only one element of the Rule concerns full-time employment, the City's argument could succeed only if the Rule were read disjunctively. Applying the criteria of the Rule separatelyh would have the effect of excluding full-time employees who fail to meet any of the other components (e.g., full-time legislative *sessional employees).* The City now concedes that the criteria of Rule 11(f) should be read conjunctively, and that it was meant to exclude persons such as independent contractors, and that the rule does not deal expressly with the exclusion of part-timers. This very vacillation on the existence of implied authority for an exclusion of part-time employees undermines the reliance on NYCERS' practical construction given by the Appellate Division. A practical construction of a law wil not be applied by courts where the proffered interpretaion has been erratically applied or is contrary to the plain wording of the statute itself *(compare, Matter of Hellerstein v. Assessor of Town of Islip,* 37 NY2d 1).

The NYCERS Board of Trustees surely lacks the authority to create retirement eligibility; it likewise lacks the power *to disentitle employees* whom the Legislature has empowered. To counterance the latter, as has been

urged here by the City, would allow the agency to, in effect, amend the heart of this statute. "An administrative agency cannot by regulatory flat directly or indirectly countermand a statute enacted by the Legislature" *(Servomation Corp. v. State Tax Commn.* 51 NY2d 608, 612, *supra; see, Kursks v. Merchants Mutual Ins. Co.,* 49 NY2d 451, 459, *supra*). Where, as here, the statute described the particular class of persons, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" *(McKinney's Con. Laws of NY* Book 1, *Statutes,* %240; see, *Eaton v. NYC Counciliation & Appeals Bd.,* 56 NY2d 340, 345). Thus, the resolution of the NYCERS Board of Trustees cannot be legitimized by Judicial ratification *(see, Mater of Industrial Comm. of State of New York v. Five Cornrs Tavern,* 47 NY2d 639, 646-647).

The statutory eligibility for NYCERS membership as applicable to these plaintiffs, part-time doctors in New York City Health and Hospitals Corporation employ, is plain and unqualified and must be given effect. That is the judicial function in this case. Fiscal, collective bargaining and other public policy ramifications of this case in regard to this result and its Precedential implications are concerns for the legislative and executive functions *(Matter of Kellerstein v. Assessor of Town or Islip,* 37 NY2d 1, 13-14, *supra).*

Accordingly, the order of the Appellate Division insofar as appealed from should be reversed, with costs to plaintiffs, summary judgment should be granted declaring in favor of the plaintiffs on the first cause of action, and the certified question should be answered in the negative.

Order insofar as appealed from reversed, with costs, summarfy judgment granted declaring in favor of plaintiffs on the first cause of action and certified question answered in the negative. Opinion by Judge Bellacosa, Chief Judge Wachtler and Judges Simons, Kaye, Alexander, Titone and Hancock concur.

Appendix N—Summons and Complaint

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Robert R. Kaufman

Plaintiff

v.

New York City Employees
Retirement System.

Defendant

CIVIL ACTION FILE NO. 88 CIV 1278

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon

Harold J. McLaughlin Esq.
32 Court Street
Brooklyn, New York 11201

Plaintiff's attorney, whose address

32 Court Street
Brooklyn, New York 11201

an answer, to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court,

Deputy Clerk.

[Seal of Court]

Date: February 24, 1988

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO._____

Robert R. Kaufman,

Plaintiff

v.

New York City Employees Retirement System.

COMPLAINT

Defendant

1. This is a Civil Action brought under 42 U.S.C. section 1983 in which plaintiff seeks a Declaratory Judgment pursuant to 28 U.S.C. section 2201, that Rule 11(h) of the Ruyles and Regulations of the Board of Estimate of the City of New York for the Transactions of Business of New York City Employees Retirement System is Unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment of the United Sttes Constitution, and it denies plaintiff Due Process, as provided therein.

AMENDMENT XIV.**

SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside, no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Sttes, nor shall any stte deprive any person of life, liberty, or property, without due process of alw; nor deny to any person with its jurisdiction the equal protection of the law; ***** ***** etc.

2. Plaintiff further seeks injunctive relief requiring the defendant to immediately reinstate plaintiff's membership #391623 and enjoining defendant from exercising any further jurisdiction over said membership except to process, implement and pay his pension which was filed for and approved, as applied for April 1, 1985 for payments to begin June 30, 1985. Exhibit # 1 attached.

3. Plaintiff was employed in October 1966 by the Department of Social Services after passing a Civil Service Examination. He had several promotions and eventually was promoted to Administrative Asistant to the Assistant Director of the Center. This was Civil Service status.

4. As a result of a Civil Service competitive examination he was also in Septembr 1967 granted a teaching license and was employed by the City of New York as a per session teacher of English in the service of the Board of education at Erasmus Hall Evening High School and has been continuously so employed without interruption to date. The holding of both these jobs at the same time was legally authorized. This second job was also Civil Service status.

5. In 1966 as a result of his employment by the City of New York he became a member of the Respondent pension system and has remained so ever since under No. 391623.

6. In March 1974 he was separated from his position in Social Services; with no illegality, no immorality, no violation of law. He continued without interruption in his status as a teacher. As such session teacher he was not permitted to be a member of the New York City Teacher's Retirement System which is a separate entity apart from the defendant herein. Under New York City Administrative Code Section B-3-3.0 and B-3-29.0 which is the law of the State of New York. Exhibit #2, attached, he automatically became a membr of the defendant Retirement System, and hs uninterruptedly been such member since 1967, and never resigned therefrom or was lawfully separated therefrom.

7. In June 1981 which claimed he was not a member of the retirement system, Exhibit 3, attached. In September 1981 plaintiff brought an Article 78 proceeding before the Supreme Court of New York, Kings County, seeking to vacate Defendant's contention as set forth in the letter of June 1, 1981. In December of 1981 Mr. Justice Pino of the N.Y. Supreme Court dismissed the petition. On appeal to the Appellate Division Second Department the order and judgment of Mr. Justice Pino was reversed by the unanimous court which held that on the law it was erroneous and reinstated the petition and found that plaintiff could not and was not automatically terminated as a member of the Retirement System, Exhibit 4, attached.

8. On the appeal to the Appellate Division Second Department they held that plaintiff's membership was still in existence and plaintiff's contention warranted relief. Their ruling that Kaufman's membership was not terminated was tested again in an application for reargument before the Appellate Disision in which it was again pointed out that Kaufman's employment by the City in at least one job was without interruption and still continues, was again sustained and is the law of the case, Exhibit 5, attached.

9. The defendant thereafter withdrew its contest to the timelinesss of service of the petition which was the only question remanded by the Appellte Division in its Order, Exhibit 4.

10. Therefore, the Appellate Division having determined that Kaufman was never served and never separated from City employment, that decision and holding was Res Judicata and the law of the case, and should have been accepted as a bar to further contest thereon.

11. The Appellate Division having determined that plaintiff's membership was still in full force and effect, plaintiff filed his application with defendant for retirement as of April 1, 1985 and defendant acknowledged same to take effect June 30, 1985. Exhibit #1.

12. The law applicable to this case is The Administrative Code of the City of New York, Section B 3-3.0, Exhibit 2, attached. The defendant stipulated, admitted and concedes Plaintiff earned in excess of the $840.00 per annum every single year from 1967 to 1985 without interruption.

Therefore, the claimed determination by defendant that as a matter of law Kaufman was terminated as a member of the retirement system is arbitgrary capricious and illegal and violated his constitutiona rights under both Article 5, Section 7 of the New York State Constitution and the Due Process Clause of the United States Constitution.

13. On the referral for hearing as to the alleged service of notice claimed by defendant, since defendant withdrew their claim of service, we advised the Judicial Hearing Officer that that was the law of the case and the matter was therefore the applicable law. The Judicial Hearing Officer went beyond his jurisdiction and made a determination contrary to the holding of the Appellte Division and he decided that the membership had terminated. Plaintiff filed an Appeal to the Appellant Division Second Department. The Appellate Division denied plaintiff's appeal. Plaintiff applied for reargument which was denied. Plaintiff applied to the Appellate Division for leave to appeal to the Court of Appeals, which was denied, Exhibit #6 annexed. Plaintiff applied to the Court of Appeals for leave to appeal to the Court of Appeals, this was denied, Exhibit #7, annexed. Plaintiff respectfully submits he has exhausted his State remedies and is herewith applying to this Court as set forth hereinabove.

A 43

14. The matter in contgroversy exceeds, exclusive of interest, costs and disbursements, the sum of $10,000.00.

15. The plaintiff is a citizen of the State of New York, and defendant is an agency of the City of New York.

Defendant owes plaintiff in excess of approximately $20,000.00 plus retirement payments since June 30, 1985 and interest. Plaintiff has demanded payment but was refused.

16. Plaintiff has been employed by the City of New York as a teacher which teaching contract has been renewed from year to year. Exhibit #8 annexed. It is submitted that the rule of the New York City Board of Estimate Rule 11(h) is unconstitutional since it seeks to countermand and overrule the law of the State of New York and is therefore irrational, unreasonable and void as violating due process under the U.S. Constitution. It should be declared un-

constitutional as seeking to usurp the legislative power as well.

Rule 11(h) of the Rules of the New York City Board of Estimte for the Administration & Transaction of Business of New York City Employees Retirement System provides:

> No person who after October 1, 1920 renders service as a teacher, Director, Instructor, or Life Guard, in the evening or summer schools or vacation, playgrounds, shall by such service, acquire any right or benefit in the retirement system.

The verbiage is pervasive, all inclusive and is arbitrarily inreasonable as to violate all rights, both contractural and otherwise, and is therefor arbitrarily unreasonable, too restrictive and irrational and should be declared unconstitutional. Rule 11(h) seeks to apply to plaintiff's contractural rights which have been uninterruptedly renewed from year to year as per Exhibit 8 annexed, for twenty (20) years.

17. s a result of the denial and refusal to pay to this plaintiff his vested retirement allowance and pension rights due him since June 30, 1985, there is now due to this plaintiff the sum of approximately TWENTY THOUSAND DOLLARS ($20,000.00).

WHEREFORE, plaintiff demands judgment in the amount of TWENTY THOUSAND DOLLARS ($20,000.00) as back Retirement Allowance due on his retirement, plus interest, costs and disbursements and that his right to retirement allowance payments in the future be established and the relief necessary to eradicate the defendant's arbitrary, capricious and illegal conduct, and we respectfully ask this court to retain jurisdiction after declaring Section 11(h) of the Rules of the New York City Board of Estimate as set forth herein above to be a viola-

tion of due process and unconstitutional and as to any further relief as to this Court may seem necessary, just and proper.

Yours, etc.,

HAROLD J. McLAUGHLIN
Attorney for Plaintiff
32 Court Street - Suite 1700
Brooklyn, New York 11201-4490
718-624-8700

SCHEDULE OF EXHIBITS

EXHIBIT NUMBER	EXHIBIT
1	Pension Application
2	Sec. B-3-3.0 and B-3-29.0 Administrative Code
3	Letter dated 6/1/81
4	Decision of Appellate Division
5	Decision of Appellate Division
6	Denial of Leave to Appeal
7	Denial of Leave to Appeal
8	Teaching Contract

RECEIPT FOR RETIREMENT APPLICATION
together with
INFORMATION FOR OUR FUTURE PENSIONERS
(Please retain for future reference)

Robert R. Kaufman 1001 E. 29 Street Brooklyn, N.Y. 11210		
(Name)	391623 (Member No.)	Case Worker (Title)

Human Resource Agency Dept. of Social Services
(Agency)

This will acknowledge receipt of your retirement application filed on 4/1/85 to take effect on 6-30-85.

ADVANCE PAYMENTS

In order to avoid prolonged interruption in the income of retirees of this System and to provide them with a continuation of some income after retirement in the most rapid manner possible, a method of advance payments has been developed which will provide a retiree with an interim monthly check during the period required to process and pay the regular monthly retirement payment.

All retirees will receive such advance payments based on the annual earnings for the last full calendar year as last recorded by the Retirement System and on the retirement plan he had elected as a member, as follows:

1. For those in the Career Pension Plan, the monthly advance payment will be as follows:

> 1/12 x 44^{c} or earnings. For example, if earnings were $9,600, the advance payment will be 1/12 x 44^{c} x $9,600 or $352 monthly.

2. For those in the 55-Year-Increased-Service-Fraction Plan, the monthly advance payment will be as follows:

> 1/12 x (No. of years service x 1.2¢) x earnings. For example, if earnings were $9,000 with 20 years service, the advance payment will be 1/12 x 24¢ x $9,000 for $180 monthly.

3. For those in the 20-Year Half-Pay Plans (Sanitation, Correction, Housing Police, Transit Police or the regular Transit 20-Year Plan), the monthly advance payment will be as follows:

> 1/12 of 40¢ of member's earnings. For example, if earnings were $9,600, the advance payment will be 1/12 x 40¢ x $9,600 or $320 monthly.

4. However, for those who are not in any of the above three catogories, the monthly advance payment will be 1¢ of his total accumulted deductions as last recorded by the Retirement System.

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM
220 Church Street, New York, N.Y. 10013
DESIGNATION OF BENEFICIARY

1. These are separate benefits; you may designate the same or different beneficiaries for each brought.
2. This form may be used to acumulate one or more beneficiaries for each benefit.
3. Should you nominate more than one beneficiary for either or both benefits, said benefit will be paid in equal shares, or to the survivors or survivor.

To the New York City Employees' Retirement System:

In accordance with Chapter 929 of the Laws of 1937 of the State of New York, I Robert R. Kaufman, registered in the New York City Employees' Retirement System as Member No. C391623 hereby nominate:
Anna Kaufman wife 12/13/40 1001 E. 29 St., Bklyn., NY 11210 as my beneficiary or beneficiaries for the CASH DEATH BENEFIT in the event of my death as a member in city-service, *or* the pension reserve under Option I if such reserve is payable as a presumed retirement death benefit in the event of my death as a member in city-service *after* eligibility for retirement.

I further nominate: Anna Kaufman wife 12/13/40 1001 E. 29 St., Bklyn, NY 11210 as my beneficiary or beneficiaries for the ACCUMULATED DEDUCTIONS from my compensation in the event of my death as a member or former member, *or* the annuity reserve under Option I if such reserve is payable as a presumed retirement death benefit in the event of my death as a member in city-service *after* eligibility for retirement.

I understand that should I survive the beneficiary (or all beneficiaries if more than one has been nominated) for either or both benefits, said benefit or benefits will then be payable either to my ESTATE or to such other beneficiary or beneficiaries that I may hereafter nominate in accordance with the law.

was born on July 2, 1914 (for Identification)
Robert R. Kaufman
1001 E. 29 St.
Bklyn, NY 11210
Signature s/ Robert Kaufman

This application should be acknowledged before a Notary Public or Commissioner of Deeds
County of Kings, State of New York
On this 1 day of April, 1985, appeared before me the said Robert R. Kaufman, to me personally known and known to me to be the individual described in and who executed the foregoing instrument and he (or she) duly acknowledged that he (or she) executed the same and that the statements contained therein are true.

***

RELEVANT STATUTES

NEW YORK CITY ADMINISTRATIVE DOCE

§B3-3.0 Membership; composition and eligibility,-Except as otherwise provided in section B3-48.0 of the code, the membership of the retirement system shall consist of:

1. *All persons in city-service,* as defined in this title, in positions in the competitive or labor class of the civil service, who entered or reentered such service after the first day of Octob er, nineteen hundred twenty, whose compensation is at a rate not less than eight hundred forty dollars per annum, and who completed or shall complete six months of city-service after such entrance or re-entrance. (emphasis added)

§B-29.0 Termination of membership; discontinuance of service.-Should a member discontinue city service except by death or retirement, he shall be paid such part of the amount of the accumulated deductions, if any, standing ot the credit of his indivicual account in the annuity savings fund as he shall demand. . . . . .

Exhibit 2

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM
220 Church Street, New York, N.Y. 10013
Telephone 566-5739
HAROLD HERKOMMER, Executive Director
JONATHAN SCHWARTZ, Chief Actuary

June 1, 1981

M.[c] 391623

Mr. Robert R. Kaufman
61 Eastern Parkway
Brooklyn, New York 11238

Dear Sir:

This office has been advised by the Department of Social Services that you were dismissed from your position as Caseworker in that Department, effective March 6, 1974, close of business (copy attached).

Under existing law, your membership in this System must be terminated as of the date of your dismissal without any interest credit to your account after that date.

In view of the avove, enclosed is an appropriate application on which you may apply for the return of your total accumulated salary deductions. Kindly complete the for, sign your name in the space provided for your signature and the identification stud, and return it to this office after notarization. The pro-

cedure for refund will take approximately six weeks after the receipt of your application.

Very truly yours,

Jane Murphy
Chief, Refund Section

JM:EP
Attachment.

DAVID T. GIBBONS, J.P.
WILLIAM C. THOMPSON
MOSES M. WEINSTEIN
RICHARD A. BROWN, JJ.

A - November 22, 1983

__AD2d__

1228 E

In the Matter of Robert R. Kaufman, appellant, v. Department of Social Services, et al., Respondents.

Harold J. McLaughlin, Brooklyn, N.Y., for applellant.

Frederick A. O. Schwartz, Jr., Corporation Counsel, New York, N.Y. (Ronald E. Sternberg and Barbara A. Cass of Counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of respondent New York City Employees Retirement System, which terminated petitionr's membrship therein, the petitioner appeals from a judgment of the Supreme Court, Kings County (PINO, J.), dated December 14, 1981, which dismissed the proceeding.

Judgment reversed, on the law, without costs or disbursements, and matter remitted to Special Term for further proceedings.

In this proceeding which was initially brought *pro se,* petitioner seeks to challenge a determination of respondent New York City Employees Retirement System terminating his membership therein. Petitioner's membership in the retirement system arose out of his employment as a case worker for respondent Department of Social Services (DSS) from September 7, 1966 until his dismissal on March 6, 1974. In a prior proceeding, this court upheld petitioner's dismissal *(Matter of Kaufman v. Dumpson,* 45 AD2d 993, mot to dsmd app granted 35 NY2d 993).

Respondents moved in the instant proceeding to dismiss the petition on the ground that it failed to state a cause of action and that it was time barred (CPLR 7804, subd [f]). Special Term dismissed the petition without opinion and petitioner appeals.

Respondents contend that petitioner's membrship in the retirement system terminated by operation of law pursuant to subdivision 1 of section B3-31.0 of the Administrative Code of the City of New York, which provides, *inter alia,* that membrship in the retirement

system shall cease "When the time out of city-service***shall aggregate more than five years in any priod not exceeding ten consecutive years since he lst became a member". They argue that since petitioner was dismissed by DSS in March, 1974, his membership in the retirement system had been terminated and, therefore, on its face the petition fails to state a cause of action.

Upon review of the record herein, and being mindful of the fact that petitioner originally brought this proceeding *pro se,* it would seem that his claim, although inartfully set forth, is that at some point wihtin the five-year period following his dismissal by DSS be reentered city service and therefore is not subject to automatic termination from the retirement system under subdivision 1 of section B3-31.0 of the Administrative Code. We conclude that such allegations set forth a claim for relief and further that with respect to the issue of timeliness of the petition, there is a question of fact as to when petitioner was notified of the termination of his membership in the retirement system.

No. 2396

In the Matter of Robert R. Kaufman, appellant, v. Department of Social Services, et al., respondents.

Motion by respondents for reargument of the appeal from a judgment of the Supreme Court, Kings County, dated December 14, 1981, which was reversed by order of this court dated February 14, 1984.

Motion denied, with $20 costs.

Exhibit 5

GIBBONS, J.P., THOMPSON, WEINSTEIN & BROWN, J.J., concur.

June 25, 1984 IN RE KAUFMAN v. DEPT. OF SOC. SERV. No. 2396

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT

0977K
P/ni

Dated - October 1, 1987

GUY J. MANGANO, J.P.
RICHARD A. BROWN
GERALDINE T. EIBER
STANLEY HARWOOD, JJ.

Motion No. 5443
DECISION & ORDER ON MOTION
In the Matter of Robert R. Kaufman, appellant, v. Department of Social Services, et al., respondents.

Motion by appellant for reargument and reconsideration of appeal or for leave to appeal to the Court of Appeals from an order of this court, dated May 11, 1987.

Upon the papers filed in support of the motion and the papers filed in opposition thereto. It is

ORDERED that the motion is denied.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

October 1, 1987 IN RE: KAUFMAN v. DEPT. SOC. SVCS. Mot.No. 5443

Exhibit 6

2-10 Mo. No. 1247
In the Matter or Robert R. Kaufman,

Appellant,

vs.

Department of Social Services, et al.,

Respondents.

Motion for leave to appeal denied.

Exhibit 7

BOTH SIDES OF THIS APPLICATION MUST BE COMPLETED BY APPLICANT

Board of Education of the City School District of New York
Division of Personnel
September 1, 1987 - August 31, 1988 Per Session Year
Application For Per Session Employment and Claim for Rights

1987-88 EVENING HIGH SCHOOLS

INSTRUCTIONS: This form is to be completed *prior to commencement of employment* by a person applying for work in a per session activity. It should be retained in the file: of the supervisor or program head. An applicant who wishes to claim retention rights must assert such a claim by use of this form. No person may be employed or paid for a second per session activity or for more than 270 hours in one or a combination of per session activities without prior written approval of the Executive Director of Personnal, in accordance with Chancellor's Regulation C-175. (This form may be reproduced locally.)

1. Name: (Last, First, Mi) Dr. Robert R. Kaufman

2. Address: 1001 E. 29th Street, Brooklyn, N.Y. 11210

3. Home Tel.No. (718) 258-7235

4. File No.: 375762(if applicable)

5. Soc. Sec. No. 110/09/0823

6. Full Time Employment District:
School or Bureau Scheduled Hrs. of Daily Employment
License or Title From: To:

7. Per Session Employment Applied For
School or Bureau: Evening High Schools
Title of Position: Teacher-English
Sessions in This Activity: Up to 75 hrs. per session
3 hrs-10 min. Total Hours 240+
Do You Claim Retention Rights in the Position
For Which You Are Applying?

YES: xx No:

District: Division of High Schools-56
Scheduled Hurs. of Daily Emloyment
From: 5:50 P.M. To: 9:00 P.M.

8. Have You Worked Or Do You Plan To Work In Any Other Per Session Activity During This Per Session School Year (September 1 - August 31)? Yes: No: x
If Yes, Indicate Below: (List Additional Positions On Back Of This Page) (Attachment)
Program Name: District School or Bureau
Title of Position:
Actual or Proposed Period of Employment From: To:
Scheduled Hours of Employment From: To:
Sessions in This Activity Hrs. Per Session: Total Hrs.
Do You Claim Retention Rights In This Position?
Yes: xx No:

*Note: Under Collective Bargaining Agreements, You May Claim Retention Rights In At Most One Activity.

9. DECLARATION: I affirm that the information given above is, to my knowledge, accurate and complete and I understand that a willfully false answer to any question contained herein shall render this application null and void and may result in loss of retention rights, cancellation of employment, loss of pay and disciplinary action. I further declare that I am familiar with the requirements and limitations cited in Chancellor's Regulation C-175 and I agree to be bound by those provisions.

Signature of Employee: Date: February

APPROVAL BY SUPERVISOR: I certify that this applicant possesses the qualifications established for the position and that the selection was made after following advertising procedures set forth in Chancellor's Regulation C-175. (A copy of the advertisement is attached.)

Signature of Mr. Weissman: Date:

Form CP 175(5.3-1) - OP 175 EHS 87-88, Pg. 2

BOTH SIDES OF THIS APPLICATION MUST BE COMPLETED BY APPLICANT

EXHIBIT 8 (2 pages)

FRANK L. SMITH, JR.
EXECUJTIVE DIRECTOR

HIGH SCHOOL DIVISION

EVENING HIGH SCHOOL APPLICATION FOR 1987-1988

1. Dr. Robert R. Kaufman
Home Address: 1001 East 29th Street,
Boro: Brooklyn Zip Code: 11210
Home Phone No.: (718) 258-7235

2. Indicate with an X the Position sought

X Teacher of English Subject of High School License
Teacher Library
Secretary
Lab.Spec.:Bio Ph&Ch Previously Submitted
Guidance Counselor: (Attach photocopy of your license)
General Asst. Subj. of Anciliary Certificate(If held)
Supv-In-Charge
Supervisor: Subj.
Ed. Para: File No. 375762
School Aide: - Soc.Sec. No.

3. Present Status: Regularly appointed to Senior H.S. School
OTHER School: Erasmus Hall Eve. H.S.
School Tel. No. ( ) since 1967

4. Number of years of service in Evening High Schools (19)

5. Number of years of service in school system as
teacher 19 other (Specify)

6. Per-Session Employment

A. Were you employed in an evening high school for this jper-session year September 1986 - June 1987?
Yes: x--No:
If Yes, what school?: Erasmus Hall Eve. H.S.
Did you claim retention rights for this position?
Yes: No:

B. Are you employed in any other per-session activity of the Board of Education for the per-session year September 1986 - August 1987?: Yes: No: No
Do you claim retention rights for this activity?
Yes: No:

C. Do you plan to work in any other per-session activity during the 1987-88 year?
Yes: No: No If yes, name activity

7. Number In Order Of Preference the borough in which you are seeking employment:
__BRONX X BROOKLYN MANHATTAN QUEENS S.I.

NOTE: THE CURRENT DUAL JOB REGULATIONS CONTAINED IN CHANCELLORS REGULATIONS C-175 PERMITS MORE THAN ONE PER SESSION ACTIVITY ONLY IN SPECIAL CIRCUMATANCES.

I hereby state that I understand any misrepresentation of material facts in this application, through mis-statement or omission, may cause invalidation of the application.

Signature Date: February

Application Noted by:

Signature: S. (Steve) Leighton
principal/School Supervisor of Day
School in which you are employed

School: Erasmus Hall Eve.H.S. Date: Feb.

MAIL APPLICATION TO: Mr. Kenneth Weissman, Principal, Evening High Schools, Room 223, 525 West 50th Street, NY, NY 10019. Complete application (both sides) must be received on/or before March 27, 1987. Assignments will be made before the summer for next fall. Please attach a separate wheet for any information you wish to add. **Please attach a photocopy of your license.**

OP 175 EHS 1987-88

Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT R. KAUFMAN,

Petitioner,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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29 pp

QUESTIONS PRESENTED

1. Is this action precluded by the Full Faith and Credit Act, 28 U.S.C. §1738, where petitioner is claiming that an administrative rule barring him from membership in a public employees' retirement system deprives him of equal protection and due process of law, but petitioner previously challenged the same administrative rule in New York's courts and a final determination was made upholding the rule?

2. Is a constitutional claim stated by petitioner's argument that an administrative rule excluding evening school instructors from pension eligibility is void because it impermissibly restricts the eligibility granted by statute, where the rule has been upheld by an intermediate appellate court in New York and, even if it is ultra vires, it is simply an erroneous interpretation of rights granted by local statute?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
REASONS WHY THE WRIT SHOULD BE DENIED	
POINT I	
THIS ACTION IS PRECLUDED BY PETITIONER'S PRIOR STATE COURT ACTION LITIGATING HIS PENSION ELIGIBILITY	9
POINT II	
IN ANY EVENT, PETITIONER'S CLAIM TO ELIGIBILITY FOR A PENSION DOES NOT IMPLICATE ANY RIGHTS PROTECTED BY THE CONSTITUTION	12
CONCLUSION	16

APPENDIX

Kaufman v. New York City Employees' Retirement System, No. 29416/85 (N.Y. Sup. Ct. Kings County Nov. 18, 1986) A-1

TABLE OF AUTHORITIES

Cases:	Page
Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982)	15
Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir. 1987)	14
Doctors Council v. New York City Employees' Retirement System, 71 N.Y.2d 669, 529 N.Y.S.2d 732 (1988)	6, 7, 11
Kaufman v. Department of Social Services, 99 A.D.2d 778, 472 N.Y.S.2d 31 (2d Dep't 1984)	5
Kaufman v. Department of Social Services, No. 29416/85 (N.Y. Sup. Ct. Kings County Nov. 16, 1986)	5, 11

TABLE OF AUTHORITIES CONT'D

Page

Cases

Kaufman v. Department of Social Services, 131 A.D.2d 576, 516 N.Y.S.2d 291 (2d Dep't), appeal denied, 70 N.Y.2d 613, 524 N.Y.S.2d 432 (1987) 6, 11

Kaufman v. Dumpson, 45 A.D.2d 993, 359 N.Y.S.2d 996 (2d Dep't 1974), appeal dismissed, 35 N.Y.2d 993, 365 N.Y.S.2d 1029, appeal denied, 36 N.Y.2d 643, 368 N.Y.S.2d 1025 (1975) 4

Kaufman v. New York City Employees' Retirement System, No. 88-7691 (2d Cir. Feb. 3, 1989) (Reprinted in Petition for Certiorari at 1a) 10

Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 9

TABLE OF AUTHORITIES CONT'D

Page

Cases

O'Brien v. City of Syracuse, 54 N.Y.2d 353, 445 N.Y.S.2d 687 (1981) 10

Reilly v. Reid, 45 N.Y.2d 24, 407 N.Y.S.2d 645 (1978) 10

Slater v. American Mineral Spirits Co., 33 N.Y.2d 443, 354 N.Y.S.2d 620 (1974) 12

Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) 14

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 9

Wright v. National Bank of Stamford, 600 F. Supp. 1289 (N.D.N.Y.), aff'd w/out opn., 767 F.2d 909 (2d Cir. 1985) 10

TABLE OF AUTHORITIES CONT'D

	Page
Statutes	
28 U.S.C. §1738	i, 1
42 U.S.C. §1983	9
New York City Administrative Code §13-101(3)(a)	2
New York City Administrative Code §13-104	2, 6
Administrative Regulations	
Rules and Regulations of the New York City Board of Estimate for the Administration and Transaction of the Business of the New York City Employees' Retirement System	
Rule 11(f)	2, 6
Rule 11(h)	3, 6, 7

No. 88-2059

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT R. KAUFMAN,

Petitioner,

-against-

NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

a. Federal Statute

28 U.S.C. §1738:

> The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or

> usage in the courts of such State . . . from which they are taken.

b. Local Statutes

New York City Administrative Code §13-104 (formerly §B3-3.0):

> [T]he membership of the retirement system shall consist of:
>
> 1. All persons in city-service, as defined in this title . . . .

New York City Administrative Code §13-101(3)(a) (formerly §B3-1.0[3][a]):

> "City-service" shall mean service, whether appointive or elective, as an officer or employee of the city or state of New York, of any agency thereof and of any court, so far as such service is paid for by the City. . . .

c. Administrative Regulations

Rules and Regulations of the New York City Board of Estimate for the Administration and Transaction of the Business of the New York City Employees' Retirement System (hereinafter "NYCERS Rules")

Rule 11(f):

> No person who is paid other than a regular per annum salary, who

> renders less than full time service . . . shall, by such service, acquire any right or benefit in the Retirement System.

Rule 11(h):

> No person who, after October 1, 1920, renders service as a Teacher, Director, Instructor or Life Guard in the evening or summer schools or vacation playgrounds shall, by such service, acquire any right or benefit in the Retirement System.

STATEMENT OF THE CASE

Petitioner, an evening school teacher, claims violation of his constitutional rights to equal protection and due process because a rule of respondent's bars evening school teachers from membership in the New York City Employees Retirement System (NYCERS), the pension system for most New York City employees. Petition for Certiorari at 4-6 (hereinafter "Petition").

Petitioner was first employed by the City of New York in 1966 as a caseworker in the Department of Social Services, and he

became a member of NYCERS. Complaint, pars. 3, 5 (reprinted in Petition at 50a-51a). Petitioner has also worked continuously since 1967 as an instructor in an evening school. Complaint, par. 4 (Pet. at 50a).

In 1974, petitioner was dismissed from his caseworker position for insubordination, a dismissal upheld by New York's courts. See Complaint, par. 6 (Pet. at 51a); Kaufman v. Dumpson, 45 A.D.2d 993, 359 N.Y.S.2d 996 (2d Dep't 1974), appeal dismissed, 35 N.Y.2d 993, 365 N.Y.S.2d 1029, appeal denied, 36 N.Y.2d 643, 368 N.Y.S.2d 1025 (1975).

Petitioner was informed that this dismissal rendered him ineligible for NYCERS membership (Pet. at 62a), and he sued in the New York courts for a judgment declaring that he was still in NYCERS. His petition, filed pro se, focused on his 1974 dismissal from his caseworker position.

The suit was dismissed at first, but the Appellate Division of New York State Supreme Court reversed that order, remanding the case because, although the pro se petition did not state a claim, the full record showed petitioner might be eligible for membership in NYCERS by virtue of his evening school employment. See Kaufman v. Department of Social Services, 99 A.D.2d 778, 472 N.Y.S.2d 31 (2d Dep't 1984).

After remand, the suit was again dismissed, and petitioner appealed. While this appeal was pending, petitioner filed another state court action seeking pension eligibility, but this second suit was dismissed as an improper attempt to relitigate the issues determined in the first pension suit. See Kaufman v. Department of Social Services, No. 29416/85 (N.Y. Sup. Ct. Kings County Nov. 16, 1986) (reprinted infra at A-1).

On the appeal in the first pension action, the Appellate Division upheld the dismissal of petitioner's action, finding that NYCERS Rule 11(h), barring evening school instructors from membership, was valid because it was "neither irrational nor unreasonable." See Kaufman v. Department of Social Services, 131 A.D.2d 576, 577, 516 N.Y.S.2d 291 (2d Dep't), appeal denied, 70 N.Y.2d 613, 524 N.Y.S.2d 432 (1987).

Subsequently, in an unrelated case, New York's Court of Appeals struck down the exclusion in NYCERS Rule 11(f) of part-time City employees from pension membership, holding that the rule does not conform to the governing statute (N.Y.C. Admin. Code §13-104), which makes all City employees eligible for NYCERS membership. See Doctors Council v. New York City Employees' Retirement System, 71 N.Y.2d

669, 675, 529 N.Y.S.2d 732 (1988) (hereinafter "Doctors Council").[1]

SUMMARY OF ARGUMENT

Federal courts must give the New York judgment dismissing petitioner's earlier challenge to NYCERS Rule 11(h) the same preclusive effect it would receive in New York's courts. In New York, petitioner could not assert the constitutional claims raised in this action because they arise from the same events that spawned petitioner's first pension action. Nor does the New York Court of Appeals' holding in Doctors Council, supra, 71 N.Y.2d 669 alter this result, even though that ruling calls into

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[1] As a result of this decision, evening school teachers are being treated as eligible for membership in a retirement system. No decision has been made on which of New York City's several retirement systems is appropriate for evening school teachers nor has the question of retroactive pension eligibility been resolved.

question the reasoning used by the Appellate Division when it dismissed petitioner's action. Under New York law, once a suit has been finally determined, a subsequent change in the interpretation of the law can not be used to undo the result.

Nor is there any merit to petitioner's constitutional claim. NYCERS enacted a rule that may have erroneously kept petitioner and other evening school teachers from becoming NYCERS members. The fact that the rule was upheld by an intermediate appellate court in New York shows that it was not an arbitrary and irrational usurpation of clear statutory rights. Accordingly, the rule's application to petitioner is not a deprivation of due process.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THIS ACTION IS PRECLUDED BY PETITIONER'S PRIOR STATE COURT ACTION LITIGATING HIS PENSION ELIGIBILITY.

The state-court judgment dismissing petitioner's action for pension eligibility based on his evening school employment precludes this suit seeking the same relief. In Migra v. Warren City School District Board of Education, 465 U.S. 75, 84-85 (1984), this Court held that, in actions pursuant to 42 U.S.C. §1983, federal courts must give a state-court judgment the same claim preclusive effect it would have in the courts of the State that issued the judgment. See also, University of Tennessee v. Elliott, 478 U.S. 788, 796 (1986).

The Second Circuit Court of Appeals correctly determined that this action would

be barred in a New York court. See Kaufman v. New York City Employees' Retirement System, No. 88-7691 (2d Cir. Feb. 3, 1989) (reprinted in Petition at 1a, 3a). In O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687 (1981), the New York Court of Appeals held that, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy." (citation omitted); accord, Reilly v. Reid, 45 N.Y.2d 24, 30, 407 N.Y.S.2d 645 (1978); see also, Wright v. National Bank of Stamford, 600 F. Supp. 1289, 1299 (N.D.N.Y.), aff'd w/out opn., 767 F.2d 909 (2d Cir. 1985) (applying New York rule).

Petitioner's New York action sought exactly what he is seeking here: a determination that his service as an evening

school teacher entitles him to NYCERS membership. The Appellate Division of New York's Supreme Court upheld the dismissal of petitioner's action, ruling that the same NYCERS rule being challenged here was lawful. See Kaufman, supra, 131 A.D.2d at 577. New York's highest court denied leave to appeal this order. 70 N.Y.2d 613, 524 N.Y.S.2d 432. Indeed, New York's courts have already dismissed a second state-court lawsuit on this subject as an improper attempt to relitigate petitioner's first state pension action. See, infra at A-1.

This action remains precluded even though the reasoning in the New York Court of Appeals' subsequent decision in Doctors Council, supra, 71 N.Y.2d 669, (invalidating a rule excluding part-time employees from NYCERS membership) calls into question the result reached in petitioner's first state-court pension suit. See supra at 7,

n.1. In Slater v. American Mineral Spirits Co., 33 N.Y.2d 443, 447-448, 354 N.Y.S.2d 620 (1974), New York's Court of Appeals ruled that, "[t]he conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law . . . . Indeed, to hold otherwise might be to raise constitutional issues." (citations omitted).

POINT II

IN ANY EVENT, PETITIONER'S CLAIM TO ELIGIBILITY FOR A PENSION DOES NOT IMPLICATE ANY RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION.

Assuming, arguendo, that this action is not precluded by petitioner's pension litigation in New York's courts, there is no merit to petitioner's constitutional claim. Petitioner asserts that NYCERS' rule barring evening school teachers from pension eligibility violates his rights to equal protection and due process because the rule

impermissibly impinges on pension rights granted by statute. See Petition at 4-6. However, even if the rule was invalid, its promulgation does not violate any federally-protected rights.

Petitioner has never articulated the basis for his constitutional claim. An exclusion of evening school teachers from pension membership does not violate equal protection rights. Absent discrimination for impermissible reasons, such as race, states and localities may certainly choose which categories of employees should receive retirement benefits and which should not.

Nor was petitioner denied procedural due process. As the history of this case indicates, petitioner had ample opportunity to use the state courts to litigate the validity of the rule excluding him from NYCERS membership.

Petitioner's claim seems to be one of denial of substantive due process. However, petitioner's pension rights, if any, flow solely from state and local law. The Constitution would not be violated if NYCERS interpreted petitioner's rights more narrowly than state and local statutes intended. Compare Dean Tarry Corp. v. Friedlander, 826 F.2d 210 (2d Cir. 1987) (no due process violation where deprivation resulted from an administrative regulation subsequently found to violate state law) with Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) (due process violation where official arbitrarily denied a clear legal entitlement). In Dean Tarry, 826 F.2d at 213, the Second Circuit Court of Appeals explained that the arbitrary action in Sullivan violated due process rights because the official acted "out of thin air" to deny a clear legal entitlement, while the administrative regulation in Dean

Tarry negated any reasonable expectation of entitlement, even though it was subsequently found invalid.

As the Court held in Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 831 (1st Cir.), cert. denied, 459 U.S. 989 (1982), where plaintiff claimed denial of due process based on a town's alleged violations of state law in denying approval of a development plan:

> were [petitioner's] theory to be accepted, any hope of maintaining a meaningful separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error . . . could be brought in to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.

This reasoning is equally applicable here. Even if NYCERS' rules erroneously infringed on petitioner's pension rights, that did not

deprive petitioner of any rights secured by the U.S. Constitution.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

July 12, 1989

Respectfully submitted,

PETER L. ZIMROTH,
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of Counsel.

*Counsel of Record

SUPREME COURT OF THE STATE
OF NEW YORK
COUNTY OF KINGS
----------x

In the Matter of the
Application of
ROBERT R. KAUFMAN,

BY: J. SPODEK, J.

Petitioner,

Index No.
-against- 29416/85

NEW YORK CITY EMPLOYEES
RETIREMENT SYSTEM,

Respondent.
----------x

Petitioner seeks a judgment pursuant to the provisions of Article 78 of the C.P.L.R. directing respondent to process, implement and pay petitioner certain pension benefits. Respondent cross moves for summary judgment on the grounds of collateral estoppel.

Petitioner's contentions were originally raised before the Justice presiding at Special Term, Part I of this court, who dismissed

petitioner's application in a judgment dated December 14, 1981. Special Term's dismissal was reversed in an order of the Appellate Division, Second Department dated February 14, 1984, and the matter was remanded for further proceedings. It was then assigned for hearing and determination to a judicial hearing officer who dismissed the petition in a lengthy memorandum opinion dated December 20, 1985. Petitioner then served a notice of appeal on January 30, 1986.

Petitioner now seeks to relitigate the same issues which were determined in the opinion of the judicial hearing officer dated December 20, 1985. Said determination is

currently under appeal and petitioner is collaterally estopped from attacking the prior determination by instituting the instant proceeding. The only appropriate method of challenging the prior decision is by pursuing the appeal noticed on January 30, 1986.

Accordingly, respondent's cross motion to dismiss is granted pursuant to the provisions of Section 322(a)(5) [sic][1] of the C.P.L.R.

Settle judgment.

Dated: November 18, 1986

/s/
J.S.C.

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[1]The reference should be to N.Y. Civ. Prac. Law 3211(a)(5).